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# Supreme Court of the United States

October Term, 1967.

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## No. 1319

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**WILLIAM P. HAGERTY,**
**Petitioner,**

**versus**

**STATE OF LOUISIANA,**
**Respondent.**

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**Petition for Certiorari to Review Judgment of Supreme Court of Louisiana, No. 48617, "State of Louisiana v. William P. Hagerty".**

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## INDEX.


| | Page |
|---|---|
| OPINION BELOW | 2 |
| JURISDICTIONAL STATEMENT | 2 |
| QUESTION PRESENTED | 2 |
| STATUTES INVOLVED | 3 |
| STATEMENT | 3 |
| REASONS FOR GRANTING THE WRIT | 10 |
| CONCLUSION | 20 |
| CERTIFICATE OF SERVICE | 22 |
| APPENDIX | 23 |


## AUTHORITIES.


Statutes:

The Louisiana "Theft Statute", LSA-R.S. 14:67 4

The Due Process Clause of the Constitution of the United States

Cases:

Lanzetta v. New Jersey, 306 U.S. 451, 83 L.Ed. 888, 59 S.Ct. 618 ..... 10

State of Louisiana v. Dabbs, 84 So.2d 601, 228 La. 960 ..... 11

United States v. National Dairy Products Corporation, 372 U.S. 29, 9 L.Ed.2d 561, 83 S.Ct. 594 ..... 10

Wright v. Georgia, 373 U.S. 284, 10 L.Ed.2d 349, 83 S.Ct. 1240 ..... 10

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*TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:*

Petitioner, William P. Hagerty, prays that a writ of certiorari issue to the Supreme Court of Louisiana to review the judgment of that Court rendered on December 11, 1967 and as to which a rehearing was denied on Jan. 15, 1968. The proceedings below are entitled "State of Louisiana v. William P. Hagerty" No. 48617 of the Docket of the Supreme Court of Louisiana.

## CITATIONS TO OPINION BELOW.

The opinion below is reported in 205 So.2d 369.

## JURISDICTIONAL STATEMENT.

Petitioner was for several years the Public Administrator for the Parish of Orleans. As such, he was entrusted with the handling and custody of vacant estates. He was charged by information with theft of certain interest on moneys entrusted to his care, the total, of a period of years, being $5,283.13. The alleged "theft" of said interest occurred during a period of years when there was no provision under Louisiana law for the investment or deposit at interest of funds held by the Public Administrator. After a trial by jury petitioner was convicted and sentenced to three years in the penitentiary.

The statutory provision relied upon as conferring jurisdiction upon this Court for the issuance of certiorari is Title 28, United States Code, Sec. 1257 (3). The Supreme Court of Louisiana is the highest Court of the State and the judgment herein complained of is a final judgment.

## QUESTIONS PRESENTED.

1. Were the constitutional rights of petitioner as to due process and equal protection of the laws violated by reason of the vague definition of the offense in the Louisiana statute defining "theft?"

2. As a companion issue to Question I, *supra,* were the constitutional rights of petitioner as to due process and equal protection of the laws violated by reason of the failure of the Court to charge the jury properly as to the elements of the offense?

3. Were the constitutional rights of petitioner as to due process of law violated by reason of the refusal of the trial Court to permit defense counsel to read to the jury crucial statutory provisions relative to the obligations of public officials entrusted with funds and refusal to instruct the jury as to such statutory law?

## STATUTES INVOLVED.

1. The Due Process clause and the Equal Protection of the Laws clause of the Constitution of the United States;

2. The Louisiana "theft statute," LSA-R.S. 14:67.

## STATEMENT.

Petitioner, William P. Hagerty, was for a period of years discussed below, the Public Administrator for Parish of Orleans, State of Louisiana. The duties of this office involve the administration of vacant estates, i.e., the estates of those who die in the Parish (County) without apparent heirs. Petitioner Hagerty was a former member of the Louisiana Legislature, having been one of the last political survivors among the New Orleans "Old Regulars". The

post of Public Administrator was a political plum, appointive by the Governor. As a "holdover" appointee from a former gubernatorial administration, Hagerty became a prime target over a period of years for the Times-Picayune, the only surviving newspaper in New Orleans and a publication which for generations has sought to lend its columns to pious projects of public protection whilst simultaneously feathering the nests of friendly birds of political prey. The Times-Picayune, over a period of years had laid down a barrage of criticism of the manner in which Public Administrator Hagerty ran his office criticizing everything from the cost of coffins to the fees paid friendly lawyers assisting Hagerty in liquidating the remnants of vacant estates after their erstwhile owners had been buried. To add further to his woes, Hagerty became an isolated target for the District Attorney of Orleans Parish, Honorable Jim Garrison, at a time just before the Shaw conspiracy case burst upon a puzzled world.[1]

The substantive criminal law of Louisiana has been under continual revision since 1928 and the present "theft statute", LSA-R.S. 14:67 is considerably broader than any common law concept of "theft". Said statute provides, in its first paragraph:

> "Theft is the *misappropriation* or taking of *anything of value* which belongs to another,

[1] As a matter of fact two of counsel for petitioner sought and obtained a continuance of the hearing before the State Supreme Court of Louisiana on the ground that one of them, Mr. Dymond, was busily engaged in his vendetta with Mr. Garrison in the Shaw case. No. 198-059, Criminal District Court, Parish of Orleans.

*either without the consent of the other* to the misappropriation or taking, *or by means of fraudulent conduct, practices or representations.*" (Emphasis added.)

On its very face, therefore, the present theft statute is a sort of hybrid partaking of both the nature of common law larceny and embezzlement. The definition of the "theft" would seem to eliminate an outright unlawful "taking" (the common law basis of larceny) because it alternatively covers "misappropriation" (the common law basis of embezzlement). Moreover, the statute expressly eliminates as an element of the offense the lack of consent of the owner. It would seem to cover a situation where the owner had consented to the taking but his consent had been procured "by means of fraudulent conduct, practices or representations."

As noted below, the State Supreme Court has long interpreted the statute as not even requiring any "misrepresentation" as long as some general sort of fraud was shown.

By a strict and technical construction, therefore, an imaginative and ambitious District Attorney could prosecute for "theft" a host of citizens whose supposed offenses could never before have been brought within the generally accepted notions of any established crime. Any action which resulted in financial gain by one citizen at the expense of another could be presented as a "theft", provided some show

of either *misrepresentation* or "fraud" could be found. With so awesome a weapon of ambiguous power in his arsenal the incumbent District Attorney, Mr. Garrison, set out to prosecute for "theft" citizens who could never have been prosecuted before for any criminal offense. For example, before the current prosecution was commenced, he convicted the head of a loan company for "theft", said "theft" consisting solely of supposedly hidden charges of interest.[2]

Although some ten bills of exception were reserved at trial we rely here only upon those bills pertinent to the three "Questions Presented" above. The bills (documented below) include a motion for bill of particulars, motion to quash or demurrer, motion in arrest of judgment, motion for new trial, refusal to give special charges relative to the nature of the offense and refusal to permit admission of evidence bearing upon the lack of guilty knowledge by petitioner. The errors complained of here are interrelated in that they bear directly upon:

(a) The vagueness of the statute; and

(b) The practical difficulty of defending oneself before a jury against an ambiguous statute in the absence of adequate explanation and protection by a trial Court alert to the dangers of a "political

[2] This was done in State of Louisiana v. Sarpy, No. 193,609, Sec. B of the Criminal District Court for the Parish of Orleans in which attacks were made upon the constitutionality of the statute. The appeal is still pending.

lynching" (which this prosecution was).

In response to a motion for bill of particulars the State had amended the information so as to charge that: (R. 20, Vol. I)

"between the nineteenth day of March, 1958, and the fourth day of October in the year of our Lord, one thousand nine hundred and sixty-two with force and arms in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans, committed a theft of FIVE THOUSAND TWO HUNDRED AND EIGHTY THREE DOLLARS AND THIRTEEN CENTS ($5,283.13) etc."

The factual background for this most unusual prosecution bears little resemblance to any classic concept of "theft", either common law or statutory.

The sole "property" which was the subject of the alleged theft over a period of years was the interest upon funds of which petitioner, as Public Administrator, had custody. These funds, while in his custody, actually belonged to no one, either the estate or the potential heirs. Petitioner was required to maintain custody of the funds of vacant estates for a period fixed by law. If any heirs made an appearance and proved up a claim to the estate the funds, after deduction of fees and costs, were paid to such heirs. If no heir appeared, then the money was transferred to the State, but, even after such transfer to the State, this did not bar absolutely a claim by the heirs for

their share of the money. Thus, while the funds entrusted to petitioner were *potentially* the property of the State, they were also *potentially* the property of the unknown heirs, if any. Title to said funds, therefore, while in the custody of petitioner, was in a state of suspense. Moreover, under the Louisiana law as of the period involved in this prosecution, *there was no provision whatever as to whether petitioner was required to invest said funds at interest or simply turn over the original amount, either to the State or the heirs.* Under the law as it then stood, petitioner was free to put the money in a savings account, keep it in a vault or bury it in a tin can in his backyard, so long as he turned over the original amount to the party ultimately entitled to it.

This situation, therefore presented what might be termed a "double hiatus", i.e., there was no law as to where or how the money should be invested and there was no law as to what happened to the interest should petitioner elect to invest the money. In this confused state of affairs, Petitioner Hagerty elected to invest the funds in time certificates which, over a period of years, had earned some five thousand dollars, the identical amount which the State herein styles as the subject of "theft" when it became commingled with his office bank account.

As will be noted in the opinion of the State Supreme Court (Appendix A) the most troublesome problem presented was the issue as to who owned the interest which was the sole subject of the al-

leged "theft". Both under the common law concept of theft as well as under the current Louisiana statute, there could be no theft unless there was an owner. The State Supreme Court solved this enigma by holding that, although as of the time of the offense, no one owned either the funds or the interest, the State had an "inchoate" right to the interest.

The "inchoate" theory of the State Supreme Court bears only secondarily here as to the unconstitutionality of the statute. But it is part of the package of ambiguity which the State labeled "theft" and placed in the lap of a jury which convicted the defendant below. Ambiguity was the prevailing vice in this prosecution. The statute itself was and is ambiguous. The information, both as originally drawn and as amended (R. 18 and 20, Vol. 1) was ambiguous in failing to specify that the sum which was the subject of theft was only the interest on money in his custody, as distinguished from the fund itself in his control. Weird procedural errors were permitted at trial (noted below) whereby, by denial of requested charges, the jury was wholly uninformed as to what must be proven in order to convict defendant. Finally, after permitting the prosecution to cross examine petitioner at length as to his knowledge of the law in regard to his responsibilities, the defense was not even permitted to rebut this by informing the jury of highly pertinent statutes bearing upon the good faith of petitioner in depositing at interest the funds in his custody when the law at the time was utterly silent as to what he should do with

said funds and what must be done with any interest accumulated during the period in which title to the funds was not vested in anyone, either the State or the heirs. These errors are presented below as denials of due process but the prime basis upon which this writ may be granted lies in the vagueness of the statute, as we will now show.

## REASONS FOR GRANTING THE WRIT.

The principal reason for granting of certiorari and the one of most general national interest is the invalidity of the statute under which petitioner was prosecuted. The applicable rule is well stated by this Court in the 1963 decision by this Court in *Wright v. Georgia*, 373 U.S. 284, 10 L.Ed.2d 349, 83 S.Ct. 1240, in which under different facts Your Honors declared: (at p. 356, column 2 of 10 L.Ed.2d)

> "It is well established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process. Lanzetta v. New Jersey, 306 U.S. 451, 83 L. Ed. 888, 59 S. Ct. 618; Connally v. General Constr. Co., 269 U.S. 385, 70 L.Ed. 322, 46 S. Ct. 126; United States v. L. Cohen Grocery Co., 255 U.S. 81, 65 L.Ed. 516, 41 S.Ct. 298, 14 ALR 1045; see also United States v. National Dairy Products Corp., 372 U.S. 29, 9 L.Ed.2d 561, 83 S. Ct. 594."

An analysis of the varying factual situations under which the foregoing rule has been applied to vague

statutes would serve no useful purpose here. The rule is clear: If the statute does not give fair warning as to what it makes criminal then the statute is invalid as denying due process of law.

It seems inconceivable that the average Louisiana business man could be deemed to know that, under the terms of R.S. 14:67 he could be prosecuted as a thief under the technical application applied here. The statute as presently applied makes it possible for an ambitious and aggressive District Attorney to prosecute as a criminal any business man who derives "anything of value" from another provided some sort of deception can be read into the business transaction.

The Supreme Court of Louisiana in 1955 gave its blessing to the broadest possible interpretation of this 1942 theft statute in *State v. Dabbs*, 84 So.2d 601, 228 La. 960 when it declared: (at page 603, col. 2 of 84 So.2d)

> "These cases were decided prior to the legislative enactment of LSA-R.S.14:67 (1942) which broadened the concept of theft to include all offenses of larceny, embezzlement and obtaining by false pretenses, and thereby abolished the distinction between these common law concepts.* * * The legislature enacted LSA-R.S.14:67 *so that it would include not merely representations, but any fraudulent conduct practices or representations. The theft statute was thus designed to enlarge its scope from that of representations only as a basis for theft by fraud and*

*to extend the concept so as to include fraudulent conduct or practice.*" (Emphasis added.)

The context in which the above language was used was in distinguishing between "representations" as distinguished from the broader term "fraudulent conduct" which might relate to either the past or future.

Thus, under the sweeping interpretation given this statute by the State Supreme Court, "fraudulent conduct" is a catch all phrase which can make criminal practically any transaction whereby one party gets a financial advantage over another. *The requirement that there must be "misrepresentation" is eliminated* and the instant case provides a clear cut example of how widely this ambiguous statute may be applied. Here Hagerty did not misrepresent anything to anybody. There is not a scintilla of evidence in the record that he ever concealed from the State or anyone else the fact that he was investing the funds in his custody at interest. Nor was there any shred of evidence that he ever concealed from the State or anyone else the fact that, over a period of years, the interest from the money (the sole subject of "theft" here) was being deposited into his bank account from which he paid not only official expenses but other expenses relating to his insurance business.

## HOW QUESTION PRESENTED BELOW.

The question as to the vagueness of the statute, as bearing upon its invalidity, was presented below, with related issues as follows:

Bill of Particulars, R. 26, Vol. 1; Demurrer and Motion to Quash, R. 32, Vol. 1; Motion in Arrest of Judgment, R. 47, Vol. 1; Motion for New Trial, R. 60, Vol. 1.

**THE DENIAL OF SPECIAL CHARGES AS AMOUNTING TO DENIAL OF DUE PROCESS.**

In addition to being faced with a vague information which we contend is invalid because of its ambiguity, petitioner was denied certain special charges which were essential to inform the jury of certain essential elements of the offense, particularly the fact that, at the time of the purported theft, the funds were actually the property of *someone*. Our objection to the denial of this essential charge was made subject of our specification of error No. I in the State Supreme Court, and had been preserved in the trial Court by Bill of Exceptions No. 7, R. 85, Vol. 1. As will be noted in said Bill, the requested charge (R. 36, Vol. I) read as follows:

> "One of the indispensable elements of the crime of theft as defined by our statute is that the property which is alleged to be the subject of the theft belong to a person other than the defendant. Consequently, in the case at bar, unless the State proves to your entire satisfaction, and beyond a reasonable doubt, that the sum of $5,-294.09 which it alleges was the subject of the theft, or any part thereof, belonged to a person other than this defendant, it would be your duty to return a verdict acquitting this defendant of the crime of theft.

There is no law in the State of Louisiana requiring that the State Treasurer or the Public Administrator for the Parish of Orleans deposit, at interest, funds which come into the possession of the Public Administrator for the Parish of Orleans in his capacity as such. This being the case, neither the State of Louisiana nor other owners of such funds have a legal right to have such funds deposited at interest. *Thus, should it be proven that the Public Administrator for the Parish of Orleans deposited funds. which were in his custody and possession and obtained interest on said deposit and then custody and possession and obtained interest on said deposit and then converted said interest to his own use, while this action may be an unauthorized use of the moneys deposited at interest, the conversion of the interest to his own use would not constitute the crime of theft for the reason that said interest was never owned or possessed by the State of Louisiana as alleged in the Bill of Information.*

This situation could be analogized to one in which a person takes an automobile belonging to another, intending to return it, and eventually returning it, but while he has that automobile of another in his possession unauthorizedly leases same at a rental of $10 per day. While he may be guilty of unauthorizedly using this automobile of another, he would not be guilty of theft of the profit which he derived from the rental thereof." (Emphasis added.)

**FUNDS DID NOT BELONG TO STATE.**

Beyond the shadow of a doubt none of the funds, from which the interest was derived, belonged to the State at the time of the alleged theft. True, the State had a residual interest in said funds if something was left over, if the true owners of said funds did not appear in time to claim their money. But, in a proper legal sense, this *could not be equated with ownership of one thin dime* of the money under Hagerty's control. For, if the heirs of various decedents all appeared and claimed their respective shares of the money being held by Hagerty as Public Administrator, then the State would be left holding a big bag of nothing.

Thus, the denial of this special charge, we submit, was highly prejudicial and the Court did not even attempt to cure the error in his general charge.

Throughout all of his Per Curiams to this and similar related Bills, the Court studiously avoided the main issue which is simply this:

IF PETITIONER WAS CHARGED WITH THEFT OF INTEREST WAS IT NOT NECESSARY TO DETERMINE THAT SOME PARTY WAS THE LAWFUL OWNER OF THAT INTEREST?

Here we perceive the significance of Act 7 of 1963 and Act 37 of 1964 (the exclusion of which forms the basis of a later bill of exception). IT WAS NOT UNTIL PASSAGE OF ACT 7 of 1963 THAT THERE WAS

ANY EXPRESS AUTHORITY FOR THE INVESTMENT OF PUBLIC FUNDS IN INTEREST BEARING "TIME CERTIFICATES", OR MORE THAN A YEAR AFTER THE TAIL END OF THE ALLEGED CONTINUING OFFENSE. (See text of Act 7 of 1963 as set forth in photostat exhibit, R. 39.)

It was only when that statute became effective that the law expressly provided anything as to the ownership of this type of interest. Thus, in Section 3 of the 1963 Act it was declared:

"Section 3. The interest *earned by the State Treasurer* on investments herein authorized shall be credited to the General Fund of the state." (Emphasis added.)

Please note that even this 1963 Act applied only to investments by the State Treasurer, *but even so this change took place more than a year after the period for which the offense is charged.* (Emphasis added.)

Next, by Act 37 of 1964 (some two years after the alleged tail end date of the offense) the Legislature broadened the provision above noted by making it applicable to the State Treasurer and "State agencies".

Assuming arguendo, therefore that the 1964 Act applied to Hagerty it did not take effect until more than two years after the alleged offense. Until that time he had a better right to the interest which he had virtually created than either the State or any unknown heirs.

Thus, without the essential idea presented as to WHO OWNED THE INTEREST, the jury was not even given a chance to weigh the possibility that Hagerty had as good or better title to the interest money than anyone. The prejudicial effect is obvious: The jury was led to believe that it could properly convict Hagerty for theft because he was greedy or overreaching without ever finding that he actually took *something that already belonged to somebody else.*

The foregoing we submit is a denial of due process of law in any State and in any Court. A similar error was committed in the failure of the Court to give a special charge to the effect that, should the jury see fit, the accused might be found guilty of the lesser offense of unauthorized use of movables. This error is set forth in Specification of Error Number Three in the Supreme Court of Louisiana and is based upon Bill of Exceptions No. 3, R. 38.

**REFUSAL TO ALLOW THE DEFENSE TO INFORM JURY AS TO CHANGES IN STATE LAW RELATIVE TO INVESTMENT OF FUNDS.**

This error was presented by Bill of Exceptions No. 5, R. 79, Vol. 1, and formed the basis of Specification of Error No. 4 in the State Supreme Court.

As noted earlier, at the time of the alleged continuing thefts of interest, there was a hiatus in the law and no provision existed for the handling of these funds, i.e., either as to how they should be kept or to whom the earned interest would accrue if invested.

This hiatus in the law was not cured until well after the period of the offense by Acts 7 of 1963 and 37 of 1964.

Thus, the fact that the Legislature found it necessary to pass a law to "take over" the interest on funds deposited by an agency, is highly persuasive of the conclusion that, before passage of such statute, the interest did not belong to the State. Indeed, when we consider the nature of the funds deposited by the State agency, (assuming arguendo that Hagerty's operation was even covered by the two amendments) the validity of the two statutes would seem questionable. For, applied to funds of the type being administered by Hagerty, there would be no logical basis on which the State could claim any equitable right to the interest. Until the funds were formally forfeited to the State by the passage of time and failure of anyone to make a claim, the State had no right to any part of said funds, either principal or interest. At the eleventh hour, so to speak, it would be legally possible, though not probable, that every last unknown heir of the lot would come wheeling into Court demanding their rights to the money left by good ole Cousin Fud and Minnie Mudd. And, if they were entitled to the money they certainly had a better title to the interest than the State itself, which had already taken a share for administrative costs.

When defense counsel Dymond sought to inform the jury, in argument, of the nature of Act 7 of 1963 and Act 37 of 1964, discussed above, there was an ob-

jection and he was not permitted to inform the jury that the law had been changed. (R. 358.)

In addition to showing *what the law actually was* at the time of the alleged offense (i.e., prior to the passage of the first of the above, Act 7 of 1963) the jury should have been informed of the hiatus existing in said law *as bearing on intent or guilty knowledge by defendant.*

This is particularly true when we consider how Hagerty had been pilloried by the State and badgered by the fact that he was a former member of the Legislature, that he was one of the co-authors of the new Code of Criminal Procedure (along with a small army of others who would find themselves hard put to distinguish between the Criminal Code and the Morse Code).

Thus, this denial of the vital information to the jury as to major legislative developments was doubly prejudicial: It kept the jury from having a fair view of the legislative changes as bearing on *who actually owned the interest* at the time of the alleged offense and it prevented their knowing anything about the two statutes which would certainly have had a bearing upon Hagerty's state of mind and intent. This was a major error and cannot be justified under any theory conceivable. The Court's suggestion that the two statutes were irrelevant because they went into effect after the dates of the alleged offense. (R. 81, Per Curiam) misses the point entirely.

## CONCLUSION.

We respectfully submit that any of the above described errors would warrant a reversal as denial of due process and particularly that the first error, the invalidity of this ambiguous and far reaching criminal statute is of sufficient national interest to warrant certiorari. In the hands of an ambitious and imaginative District Attorney such as Mr. Garrison undoubtedly is, such a statute is a veritable Sword of Damocles hanging over the heads of many citizens. As noted above, said sword began to swing wildly before the present case was created. In the *Sarpy* case, *supra,* footnote 1, amid the acclaim of the good grey Times-Picayune, the Orleans Parish District Attorney successfully created a theft case out of what was simply an overcharge and he did so while publicly admitting that he was stretching the statute in order to do so. He simply announced publicly that he was going to jail those "silk shirted Shylocks" who prey upon poor people and convicted Sarpy of theft under this same statute. Finally, we note that, upon the conviction of petitioner in the instant case the Times-Picayune congratulated itself the next day as having started the crusade of criticism of Hagerty which climaxed with his now being scheduled to go to the penitentiary for three years. This was a political lynching if there ever was one and the denial of constitutional rights to due process is glaring. In addition to everything else, it should be noted that the mainstay of the Supreme Court of Louisiana opinion here (Appendix A) is that the State had an "inchoate"

right to the interest. But there is not a line in the record to show that, even conceding, arguendo, the validity of so nebulous a theory, THE FUNDS UPON WHICH THIS "INCHOATE" RIGHT WERE TO BE ULTIMATELY APPLIED DID NOT ACTUALLY BELONG TO HEIRS WHO SHOWED UP AS CLAIMANTS. If so the State would have had no "inchoate right" to interest on somebody else's money.

For the foregoing reasons petitioner prays that a writ of certiorari issue to the Supreme Court of Louisiana in the above cause.

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## CERTIFICATE OF SERVICE.

I, G. Wray Gill, of counsel for petitioner and a member in good standing of the bar of the Supreme Court of the United States hereby certify that a copy of the foregoing petition for certiorari has been served upon opposing counsel, the Attorney General of Louisiana and the District Attorney for the Parish of Orleans, by mailing same, postage prepaid and properly addressed to their respective offices on April ..., 1968.

April ..., 1968.

G. WRAY GILL.

## APPENDIX A.

## SUPREME COURT OF LOUISIANA.

**No. 48,617.**

**STATE OF LOUISIANA,**
**versus**
**WILLIAM P. HAGERTY.**

**On appeal from the Criminal District Court for the Parish of Orleans, State of Louisiana. Honorable Thos. M. Brahney, Jr., Judge.**

HAMLIN, Justice:

Defendant (formerly Public Administrator in and for the Parish of Orleans) appeals from his conviction for the crime of theft (LSA-R.S. 14:67)[1] and sentence to serve three years at hard labor in the Louisiana State Penitentiary.

The Public Administrator in and for the Parish of Orleans is appointed by the Governor for a term of four years. LSA-R.S. 9:1581, Act 497 of 1960. He administers vacant successions, all money or other property in the Parish of Orleans which has been

[1] "Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential.

"* * * *

"When there has been misappropriation or taking by a number of distinct acts of the offender, the aggregate of the amount of the misappropriations or takings shall determine the grade of the offense." LSA-R.S. 14:67.

abandoned or the ownership of which is unknown and all the money or other property standing in the name of persons who are absent and not represented and have not been heard from for eight years or more. LSA-R.S. 9:1583, 1584, 1585. He administers any money or other property deposited with any person, bank, trust company, or other depository in the City of New Orleans, other than in a checking or savings department, and stands in the names of persons who are absent and not represented and have not been heard from for ten years or more. LSA-R.S. 9:1587.

Defendant, William P. Hagerty, became Public Administrator in and for the Parish of Orleans during June, 1956, and terminated his position in July, 1964. At the time of his appointment, Act 14 of 1926 provided that the Governor should appoint, with the advice and consent of the Senate, a suitable person to be known as Public Administrator for the Parish of Orleans, whose term of office would be for four years. Act 200 of 1952 recited, in part:

> "Sec. 1. * * * *
>
> "* * * He shall be appointed administrator of all money or other property in the Parish of Orleans which has been abandoned or the ownership of which is unknown and of all money or other property standing in the name of persons who are absent and not represented and have not been heard from for eight years or more.
>
> "It shall be the duty of any person, firm or corporation holding such funds or property to de-

liver same to the Public Administrator and his receipt for same shall relieve said person, firm or corporation from all liabilities therefore. The said Public Administrator shall then proceed to administer such property in the manner provided by law for the administration of vacant successions.

"Sec. 2. * * * *

"* * * He shall receive as a compensation five percent on all funds administered by him, and all necessary expenses incurred in administering and preserving property subject to his administration."

With funds withdrawn from the Public Administrator's account in the National Bank of Commerce, New Orleans, Louisiana, defendant purchased from said National Bank of Commerce, on September 18, 1957, a six months Certificate of Deposit for $50,000.00 in the name of the Public Administrator in and for the Parish of Orleans. After this certificate matured, the $50,000.00 was continuously reinvested in a new Certificate of Deposit until September 23, 1960, when only $40,000.00 of the $50,000.00 was reinvested; $10,000.00 was allegedly restored to the Public Administrator's account maintained in the National American Bank. The foregoing $40,000.00 was reinvested in Certificates of Deposit, the last being purchased on March 26, 1962. These Certificates of Deposit bore interest in the total amount of $5,283.13 during this five year period. The State alleges that defendant committed theft of this interest.

By Bill of Information filed April 22, 1966 and amended May 10, 1966, the State charged that William P. Hagerty "committed a theft of Five Thousand, Two Hundred and Eighty-Three Dollars and Thirteen Cents ($5,283.13) in the lawful money of the United States of America, belonging to the State of Louisiana, * * * *"

The State negatived prescription by stating in the Bill of Information that four years had not elapsed since Hagerty terminated his office, employment of fiduciary relationship to the State of Louisiana as Public Administrator for the Parish of Orleans.

Defendant was arraigned on May 3, 1966, and pleaded "Not Guilty." He was granted to May 18, 1966 to file pleadings. He was rearraigned on June 1, 1966, when the State filed its answer to defendant's application for a Bill of Particulars. Trial commenced on June 27, 1966, during the course of which ten Bills of Exceptions were reserved and are presented for our consideration.

**BILLS OF EXCEPTIONS Nos. 1 AND 10.**

Bill of Exceptions No. 1 was reserved at the opening of trial, prior to the commencement of the selection of a jury, when the trial judge denied defendant's request to withdraw his plea of "Not Guilty" for the purpose of filing a Demurrer and Motion to Quash, asking for an immediate judgment thereon and not seeking a delay.

Bill of Exceptions No. 10 was reserved after trial and verdict, but before sentence, when the trial court overruled defendant's motion in Arrest of Judgment.

The Demurrer and Motion to Quash averred that: (1) the matters as alleged in the Bill of Information and detailed in the Bill of Particulars were not sufficient in law to compel the defendant to answer thereto; (2) if all the matters as alleged were proven, no violation of the law would be proven; (3) neither the State of Louisiana nor any one other than the defendant ever had ownership of the interest money; (4) the actions which the State alleges were performed by the defendant would, at most, constitute an unauthorized use of money which was allegedly deposited, but there could be no finding of guilt in connection therewith for the reason that the defendant was charged with the theft of the interest money and not money which was allegedly deposited by defendant; and (5) the situation presented was no different from one in which a person might unauthorizedly lease an automobile which had been placed in his custody and then be charged with the theft of the money which he received as rental therefor.

The Motion in Arrest of Judgment contained substantially the same averments as those of the Demurrer and Motion to Quash, and additionally that: (1) although the owner of property is entitled to the fruits thereof, the failure to deliver such fruits to the owner under circumstances as those set forth in the Bill of Information and Bill of Particulars does not

constitute a theft; (2) the interest money was not at the time of the alleged misappropriation or taking property which "belonged to another" within the contemplation of LSA-R.S. 14:67; and (3) the Louisiana Legislature by Acts 7 of 1963 and 37 of 1964 directed the Treasurer of the State of Louisiana to do precisely the same thing which the defendant is charged with having done.

LSA-R.S. 15:284 (See, Art. 535, new Code of Criminal Procedure), which was in effect at the time of the instant trial, provided:

> "Every objection to any indictment shall be taken by demurrer or by motion to quash such indictment, before the arraignment; and every court before which any such objection shall be taken for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, and thereupon the trial shall proceed as if no defect had appeared."

LSA-R.S. 15:265 (See, Arts. 535 and 561, new Code of Criminal Procedure) provided:

> "The defendant may at any time, with the consent of the court, withdraw his plea of not guilty and then set up some other plea or demur or move to quash the indictment."

The Demurrer and Motion to Quash set forth no reason why it was filed twenty-six days after arraign-

ment and on the day of trial; under the authority of the above statutes, its allegations were not considered by the trial court. However, as stated supra, the Motion in Arrest of Judgment contained substantially the same averments, and it was considered by the trial court and found to be without merit. Under such circumstances, we do not find that the trial judge abused his discretion in not permitting the defendant to withdraw his plea of "Not Guilty" and file other pleadings. State v. Ward, 246 La. 765, 167 So.2d 359. We also find that defendant suffered no prejudice. All contentions advanced were substantially repeated in other Bills of Exceptions and received thorough consideration (and found to be without merit) during the course of trial.

The principal contention averred by defendant in the Motion in Arrest of Judgment and in the great number of other Bills of Exceptions is that in the Bill of Information the State charged that the defendant committed a theft of money belonging to the State of Louisiana, and that the State did not prove that the interest money belonged to the State of Louisiana or that the defendant had committed a theft of such money. In brief, it is averred, "We submit that it is crystal clear that, if proven guilty of anything Hagerty could not have been proven guilty of anything but unlawful use of movables, a lesser offense, and the jury was never even given any clear idea of this possible milder verdict."

Defendant testified that he purchased the Certificates of Deposit and that he did not get a court order or court authority for such purchases. He gave the following pertinent testimony:

"Q. In whose name did you purchase these certificates?

"A. The Public Administrator in and for the Parish of Orleans.

"Q. Tell me whether your name, personally, appears on any one of those certificates?

"A. The only way it appears is when I endorse it on the back, but not on the front as ownership, or anything like that."

With respect to the interest money, defendant testified:

"Q. Now, Mr. Hagerty, is it a fact that you received as interest on the certificates of deposit the sum of $5,283.13?

"A. Yes, sir.

"Q. Was that money ever deposited in the public administrator's account?

"A. No, that was deposited in my special account from which, as I explained, I operated the expenses of the office. [The State attempted to prove that expenses were not paid from the interest money.]

"Q. The interest money was public money, was it not?

"A. Yes.

"Q. The dividend money was public money, was it not?

"A. When you say, the interest money?

"Q. The interest money on the certificates of deposits; you didn't use your personal money to buy these certificates, did you?

"A. No.

"Q. You used public money, didn't you?

"A. I used money in the public administrator's funds.

"Q. And isn't that systematically turned over to the State, after a certain amount of time?

"A. Yes.

"Q. How did you do that?

"A. I turned that over after so many years and until such time, and even to this day, it is not State property.

"Q. It isn't State property?

"A. No, because any relative of any one of those people can come in at any time and claim it.

"Q. But, it is not your property?

"A. No, sir.

"Q. Positively, not your property?

"A. No, sir.

"Q. So, the interest wasn't your property either, was it?

"A. No."

In Act 14 of 1926 and in the amendments that followed, the Public Administrator is charged with the duty of administering the funds which come into his possession in accordance with the law of administration of vacant successions. Article 1147 of the Louisi-

ana Civil Code provided that "Every curator of a vacant succession or of absent heirs is bound to take care of the effects intrusted to him as a prudent administrator, and to render an exact and faithful account of the fruits and revenue they produce. He is responsible for all damages caused by his misconduct." This article was replaced by Articles 3191 and 3333 of the LSA-Code of Civil Procedure.

The Public Administrator for the Parish of Orleans conducts his appointive office in a fiduciary capacity, being a fiduciary for the State (which also becomes a fiduciary at certain times) and unknown heirs.

> "The word 'fiduciary,' as a noun, means one who holds a thing in trust for another, a trustee; a person holding the character of a trustee, or a character analogous to that of a trustee, with respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires; a person having the duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. Also more specifically, in a statute, a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person, trust, or estate. * * *" 36A C.J.S., Fiduciary, p. 381.
>
> "One is said to act in a 'fiduciary capacity' or to receive money or contract a debt in a 'fiduciary capacity,' when the business which he transacts, or the money or property which

> he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part. The term is not restricted to technical or express trusts, but includes also such offices or relations as those of an attorney at law, a guardian, executor, or broker, a director of a corporation, and a public officer. * * * *" Black's Law Dictionary, Fourth Edition (1951), Fiduciary Capacity. Cf. Oldland v. Gray, 179 F.2d 408; Emery & Kaufman, Ltd. v. Heyl, 227 La. 616, 80 So. 2d 95; Wofford v. Wofford, 244 Miss. 442, 142 So. 2d 188.

At the time the Certificates of Deposit earned the interest, the owners of the funds had neither appeared nor become known, nor had the funds been turned over to the State.

LSA-R.S. 9:1586 provided:

> "He [the Public Administrator] shall be appointed curator of all vacant successions in the Parish of Orleans, and shall administer them until the heirs present themselves and are recognized by the court and placed in possession. If no heir presents himself within one year from the date of homologating his final account, the public administrator shall pay the funds realized from the succession into the state treasury." (Act 497 of 1960 expanded LSA-R.S. 9:1586, but it still pro-

vided that, "If no heir presents himself within one year from the date of the homologation of a final account, the public administrator shall pay the funds realized from the succession into the state treasury.") See, also, LSA-R.S. 9:151.

Articles 929 of the Louisiana Civil Code provides:

"In defect of lawful relations, or of a surviving husband or wife, or acknowledged natural children, the succession belongs to the State."

Article 485 of the Louisiana Civil Code provides:

"The succession [successions] of persons who die without heirs, or which are not claimed by those having a right to them, belong to the State." See, Cordill v. Quaker Realty Co., 130 La. 933, 58 So. 819; Succession of Tyson, 186 La. 516, 172 So. 772.

The State's title to the funds in defendant's possession at the time the instant interest accrued was inchoate; that is, partial, temporary, unfinished, provisional, begun but not completed. Tennessee Gas Transmission Co. v. Violet Trapping Co., 248 La. 49, 176 So.2d 425; Wells v. Joseph, 95 So. 2d 843; Words and Phrases, Vol. 20A, Inchoate, p. 94. The State's title could have been taken away by the appearance of the previously unknown owners or heirs, but until they made their appearance the State had inchoate rights. As admitted by the defendant, supra, he did not own the funds. Under the circumstance herein, the State's inchoate title gave it an indicia of ownership.

The ownership of a thing, whether it be movable or immovable, carries with it the right to all that the thing produces, and to all that becomes united to it, either naturally or artificially. Art. 498, La. Civil Code. By right of accession, civil fruits, that is the revenue yielded by property from the operation of the law or by agreement, belong to the owner. Art. 499, La. Civil Code. Civil fruits are rents of real property, the interest of money, and annuities. Art. 545, La. Civil Code.

We conclude that the instant interest, which was the fruit of the Certificates of Deposit, was the lawful property of the State of Louisiana under an inchoate title.

The Office of Public Administrator is the creation of the Legislature of the State of Louisiana, and, as stated supra, defendant as an appointed Public Administrator was a fiduciary.[2] He was, therefore, a fiduciary of the instant interest.

The Bill of Information properly charged that the $5,283.13 belonged to the State of Louisiana. The trial judge correctly overruled the Motion in Arrest of Judgment.

Bills of Exceptions Nos. 1 and 10 are without merit.

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[2] Act 68 of 1910, one of the sources of LSA-R.S. 9:1581, supra, provides that the appointed Public Administrators shall be authorized to appear in court for and on behalf of the State of Louisiana *to assert her claim as heir, to any estate in which the State may be interested.*
LSA-R.S. 9:1588 provides that Public Administrators may appear in court in behalf of the State *to assert its claim to any succession in which the State may be interested.* One of its sources is Act 68 of 1910.
These are examples of the Public Administrator's fiduciary capacity.

## BILL OF EXCEPTIONS No. 2.

Bill of Exceptions No. 2 was reserved when the trial court overruled defense counsel's objection to the trial judge's ruling permitting James B. Lancaster, Legislative Auditor for the State of Louisiana, formerly Supervisor of Public Funds, to testify with respect to the contents of a letter he had written the defendant on May 7, 1963.

Mr. Lancaster refreshed his memory from State Exhibit S-20, which was not admitted in evidence. Counsel contended that the letter, State Exhibit S-20, contained conclusions drawn from a purported audit which was not made by the witness Lancaster, and that the findings expressed by said witness were those of another individual.

We find that the trial judge was correct in overruling counsel's objection to Mr. Lancaster's testimony. We agree with his Per Curiam which follows in part:

> "The witness testified that he had written the letter to the defendant dated May 7, 1963 in his official capacity as Supervisor of Public Funds. The Court did not permit him to read the letter but permitted him to testify as to what he had written after having refreshed his memory from the document as his refreshed recollection was the best evidence. If a witness can testify as to what he told a defendant, then certainly he can testify as to what he had written to him. There

was no claim or assertion by the defendant that he had not received such a letter. The testimony was relevant and material and was admissible. The truth or accuracy of the statement was not at issue but only that such a statement or, properly, an inquiry had been directed to the defendant regarding the matter at issue.

"Subsequently, during the trial all of this information was corroborated and developed not only by the State and the defense but also by the defendant's own testimony."

Bill of Exceptions No. 2 is without merit.

## BILL OF EXCEPTIONS No. 3.

Bill of Exceptions No. 3 was reserved when the trial court overruled defense counsel's objection to the introduction in evidence of State Exhibits S-22, S-23 and S-24.[3]

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[3] "July 9th, 1963.

"Dear Mr. Lancaster:

I just returned to N. O. this morning, & have to go out again Thursday; however if convenient to you I should like to meet you here any day next week except Monday.

Please advise me of your pleasure & I shall receive your letter upon my return home.

Yours very truly
[Sgd] Wm. P. Hagerty."
State Exhibit S-22

"May 14, 1963,

"Mr. J. B. Lancaster,
Supervisor of Public Funds,
Baton Rouge 4, La.
Dear Mr. Lancaster:

In reply to your letter of May 7, 1963 containing several items, I am able to inform you at this time as follows:

1. I have been in contact with the parties owing the balance and made formal demand on April 24, 1963, but have not received anything from them as yet, nor have I been able to pay it.
2. Difference in Liquidation Accounts. I have made arrangements to take care of this in its entirety by the end of May, I am reasonably sure. Mr. Suer quoted me correctly.
3. I have done nothing as yet on this.
4. I have been unable to attend to this up to now.
5. This item I shall take care of by next Monday, May 20th, 1963.
6. This item has been carried out some months ago, and the certificates are in our bank box at the National Bank of Commerce in New Orleans. However, we sent a check for $112,000.00 to the State Treasurer in April 1963.

I shall keep you informed as I handle these matters.

With kind regards and best wishes, I am,

Yours very truly,
[Sgd] Wm. P. Hagerty."
State Exhibit S-23

"July 2/63

"Dear Mr. Lancaster:

Please excuse this note in reply to yours of July 1st. I have not contacted in all this time because of these facts;—I have

It is contended that the exhibits contained admissions against interest written by the defendant; it is also contended that they were not mentioned in the opening statement of the State. It is argued that the admission of the exhibits were in violation of the rulings of the United States Supreme Court in the cases of Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977; Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246; and State v. McLeod, 381 U.S. 356, 85 S.Ct. 1556, 14 L.Ed.2d 682.

The trial judge was correct in overruling defense counsel's objection to the introduction of the exhibits. They were not written under custodial interrogation, and they were not directed to a police officer. The cases cited are not apposite or applicable.

The following Per Curiam of the trial judge supports the correctness of his ruling:

> "This bill was reserved when the Court permitted State Exhibits S-22, S-23 and S-24 to be offered in evidence, which were letters written by the defendant to James B. Lancaster relative to certain

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again contacted the parties in the Psayla Succ. & they have promised an answer which has not been forthcoming. So I did so again on June 25. This on Item #1. I enclose a duplicate deposit slip on Item #5;—the dividends which I was able to do today.

In regard to the liquidation accounts—Item 2—there has been considerable delay in my obtaining the funds due to sale of some assets which only last Friday I was told I should be able to receive in a week or ten days.

I shall be out of N.O. from this evening until Monday afternoon & will contact you Tues. next; July 9th at which time I may have a deposit slip for you in the liquidation matters.

Sincerely
[Sgd] Wm. P. Hagerty."
State Exhibit S-24

items of an audit concerning the defendant's activity as Public Administrator for the Parish of Orleans.

"* * * *

"This correspondence was specifically mentioned in the State's opening statement, to-wit:

"'All correspondence between the defendant, William P. Hagerty and Mr. J. Lancaster, Supervisor of Public Funds of the State of Louisiana.'

"Further, these letters were written in the ordinary course of business, before the defendant was a suspect or even considered as a possible defendant. These inquiries and responses are everyday occurrences. These letters are not confessions or admissions requiring a predicate for their admission under any stretch of the imagination."

Bill of Exceptions No. 3 is without merit.

**BILL OF EXCEPTIONS No. 4.**

Bill of Exceptions No. 4 was reserved when the trial court refused to permit counsel for the defendant to introduce in evidence the record in Proceeding No. 194-047 of the Docket of the Criminal District Court for the Parish of Orleans, a malfeasance in office charge against William P. Hagerty, defendant herein.

Counsel for the defendant contended that they were entitled to show that defendant had been charged in the Criminal District Court for the Parish of Orleans with two cases covering the same sort of facts.

The record was not relevant to the instant case. We find that the trial judge did not abuse his discretion by not admitting the record in evidence, and that defendant's rights were not prejudiced by its absence.

Bill of Exceptions No. 4 is without merit.

**BILL OF EXCEPTIONS No. 5**

Bill of Exceptions No. 5 was reserved when the trial judge sustained the State's objection to defense counsel's reading of Act 7 of 1963 and Act 37 of 1964 to the jury during closing argument.

Act 7 of 1963 provides, in part:

> "Section 1. The State Treasurer is hereby directed to invest moneys on deposit in the State Treasury belonging to the General Fund of the state and funds in the State Treasury to the credit of state agencies, departments, boards and commissions and any other funds under the control of the State Treasurer, which he, in his discretion, may determine to be available for investment in Time Certificates of Deposit of state banks organized under the laws of Louisiana and national banks having their principal office in the State of Louisiana; * * * *

"Section 2. Time Certificates of Deposit purchased by the State Treasurer under authority of this Act shall mature not more than six months after the date of their purchase. They shall bear at a rate of two percent.

"Section 3. The interest earned by the State Treasurer on investments herein authorized shall be credited to the General Fund of the state."

Act 37 of 1964 authorized the State Treasurer and the heads of all departments, boards, commissions, and other state agencies, to invest certain moneys under their control in Certificates of Deposit or other specified obligations. It provided:

"Interest earned on Certificates of Deposit purchased by the State Treasurer shall be credited to the General Fund of the state. Interest earned on Certificates of Deposit or direct U. S. Treasury obligations purchased under the authority of Paragraph B of this section of this Act shall be credited to the fund out of which the investment was made."

Counsel for the defendant argued that they wanted to show that under the Acts of 1963 and 1964 heirs appearing and claiming ownership of money in successions thought to be vacant do not receive any interest on the money of the successions. They contended that there was a hiatus in the law prior to the enactments, and that they wanted to inform the jury of the effect

of the hiatus as it bore on the intent or guilty knowledge of the defendant.

Herein, counsel argue that the fact that the Legislature found it necessary to pass Act 7 of 1963 and Act 37 of 1964 (which Acts entitle the State to interest such as is herein involved) is persuasive of the conclusion that before passage of Act 7 of 1963, the interest earned on Certificates of Deposit did not belong to the State.

Supra, in Bills of Exceptions Nos. 1 and 10, we found that defendant did not own the interest and that the State had an inchoate title to it. This finding was made absent the consideration of Act 7 of 1963 and Act 37 of 1964. These Acts enlarged and condensed into two laws much of which had been previously contained in many laws. We do not find nor does the jurisprudence show that a hiatus had previoulsy existed. There was never any indication that civil fruits belonged to a fiduciary personally. Under such circumstances, the Acts of 1963 and 1964 were not relevant evidence and the trial judge did not abuse his discretion in not permitting their reading. The defendant suffered no prejudice from his ruling. In his Per Curiam, the trial judge correctly states:

> "First, these Acts were passed subsequent to the dates alleged in the bill of information and could have no bearing on the issue. Secondly, no evidence had been introduced or elicited regarding these acts during the trial (R.S. 15:381 Code of Criminal Procedure). Thirdly, these Acts re-

ferred to the investment of idle funds by various State agencies, setting out the procedures, etc. The defendant was not charged with the improper investment of idle funds but rather with the conversion or theft of the fruits or interest of public funds that he had invested."

Bill of Exceptions No. 5 is without merit.

**BILL OF EXCEPTIONS No. 6.**

Bill of Exceptions No. 6 was reserved to the action of the trial judge in refusing to give Special Charge No. 1.

Requested Special Charge No. 1 recited:

"The defendant in this case is charged with the crime of theft. Theft is defined in our law as the misappropriation on taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practice, or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential.

"The subject of the theft in this case is alleged to be the sum of $5,283.13 of money belonging to the State of Louisiana. This being the case, in order to support a conviction of the crime of theft, the State must prove that the amount alleged, or any part thereof, was the property of the State of Louisiana as alleged; that it was misap-

propriated or taken by the defendant either without the consent of the State of Louisiana or by means of fraudulent conduct, practices, or representations.

"While the law requires that the subject of the theft merely be the property of someone other than the defendant, where the State by means of the Bill of Information, as in this case, alleges ownership in a particular individual or body politic such as the State of Louisiana, the State is bound by that allegation and must prove ownership as alleged in order to support a conviction."

LSA-R.S. 15:390 (now Art. 807, new Code of Criminal Procedure) directed that except as otherwise provided, the judge must give every requested charge that was wholly correct and wholly pertinent, unless the matter contained in the requested charge had been already given, or unless the charge required qualification, limitation, or explanation.

Herein, the trial judge's general charge contained a detailed description of the crime of theft, its ingredients, and the law's requirements with respect to proof. He did say:

"Proof of ownership in the particular person, corporation or political entity alleged in the bill of information is not important in theft. It suffices to show that the money or things of value allegedly taken were owned by someone other than the taker or misappropriator."

We found, supra, that the interest money alleged to have been stolen did belong to the State under an inchoate title; the record discloses that the State offered evidence of such fact. Under such circumstances, the requested charge was redundant, and the defendant suffered no prejudice from the trial judge's refusal to give it.

Bill of Exceptions No. 6 is without merit.

**BILL OF EXCEPTIONS No. 7.**

Bill of Exceptions No. 7 was reserved when the trial judge refused to give Special Charge No. 2 requested by counsel for the defendant.

Requested Special Charge No. 2 recited:

> "One of the indispensable elements of the crime of theft as defined by our statute is that the property which is alleged to be the subject of the theft belong to a person other than the defendant. Consequently, in the case at bar, unless the State proves to your entire satisfaction, and beyond a reasonable doubt, that the sum of $5,294.09 [5,283.13] which it alleges was the subject of the theft, or any part thereof, belonged to a person other than this defendant, it would be your duty to return a verdict acquitting this defendant of the crime of theft.
>
> "There is no law in the State of Louisiana requiring that the State Treasurer or the Public Administrator for the Parish of Orleans deposit,

at interest, funds which come into the possession of the Public Administrator for the Parish of Orleans in his capacity as such. This being the case, neither the State of Louisiana nor other owners of such funds have a legal right to have such funds deposited at interest. Thus, should it be proven that the Public Administrator for the Parish of Orleans deposited funds which were in his custody and possession and obtained interest on said deposit and then converted said interest to his own use, while this action may be an unauthorized use of the moneys deposited at interest, the conversion of the interest to his own use would not constitute the crime of theft for the reason that said interest was never owned or possessed by the State of Louisiana as alleged in the Bill of Information.

"This situation could be analogized to one in which a person takes an automobile belonging to another, intending to return it, and eventually returning it, but while he has that automobile of another in his possession unauthorizedly leases same at a rental of $10 per day. While he may be guilty of unauthorizedly using this automobile of another, he would not be guilty of theft of the profit which he derived from the rental thereof."

LSA-R.S. 15:390 provided that the trial judge must give every requested charge that is wholly correct and wholly pertinent. As we have found that the interest money herein was owned by the State under an

inchoate title, the above requested charge was not wholly correct.

The trial judge acted correctly in refusing to give Special Charge No. 2; the defendant suffered no prejudice by his ruling.

Bill of Exceptions No. 7 is without merit.

**BILL OF EXCEPTIONS No. 8.**

Bill of Exceptions No. 8 was reserved when the trial judge refused to give Special Charge No. 3 requested by counsel for the defendant.

Requested Special Charge No. 3 recited:

> "In this case the State has informed the defendant by means of a Bill of Particulars that the basis of the charge against him is that he purchased a $50,000 Certificate of Deposit from the National Bank of Commerce, in New Orleans, on September 18, 1957, with funds which he had received on behalf of the State of Louisiana in his capacity as Public Administrator; that this money was reinvested until about September 23, 1960, when the defendant reinvested $40,000 of said original $50,000 in a new Certificate of Deposit, which was reinvested until September 26, 1962, when it was restored to a bank account maintained by the Public Administrator; that from these investments he received interest in the amount of $5,283.13 which he never deposited

to any accounts maintained for the Public Administrator. It is this sum of $5,283.13 which the State alleges is the subject of the theft.

"Under such a situation, should you find that this defendant unauthorizedly used either or both of said sums which are alleged to have been invested; that is, the sum of $50,000 and/or the sum of $40,000, in these proceedings you would not have the right to find him guilty of unauthorizedly using said sums for the reason that, while the crime of unauthorized Use of a Movable is responsive to a charge of theft, such a verdict must pertain to the funds which the defendant is charged with having stolen and not to funds which are separate and distinct therefrom."

We do not find that the requested Special Charge No. 3 was wholly correct. LSA-R.S. 15:390. Further, the trial judge's general charge to the jury covered matters stated in the requested charge. The jurisprudence is legion that the trial judge may refuse a special charge when the subject matter is covered by the general charge. State v. Fuller, 218 La. 872, 51 So.2d 305; State v. Ragsdale, 249 La. 420, 187 So.2d 427. The trial judge committed no error in refusing to give Special Charge No. 3, and defendant suffered no prejudice by his ruling.

Bill of Exceptions No. 8 is without merit.

## BILL OF EXCEPTIONS No. 9.

Bill of Exceptions No. 9 was reserved when the trial judge overruled defendant's Motion for a New Trial.

The objections raised in other Bills of Exceptions were all reiterated in the Motion for a New Trial. It presents nothing for our review.

Bill of Exceptions No. 9 is without merit.

For the reasons assigned, the conviction and sentence are affirmed.

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# Supreme Court of the United States

**OCTOBER TERM, 1967**

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## No. 1319

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**WILLIAM P. HAGERTY,**
**Petitioner,**

**versus**

**STATE OF LOUISIANA,**
**Respondent.**

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**In Re: Petition for Certiorari to the Supreme Court of Louisiana.**

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**PETITION FOR REHEARING FROM DENIAL OF WRIT OF CERTIORARI.**

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**SUPREME COURT OF THE UNITED STATES**

**October Term, 1967.**

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**No. 1319.**

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**Petitioner,**

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**In Re: Petition for Certiorari to the Supreme Court of Louisiana.**

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# PETITION FOR REHEARING FROM DENIAL OF WRIT OF CERTIORARI.

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*TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:*

Petitioner, William P. Hagerty, through undersigned counsel, petitions this Court for a rehearing as to the judgment and opinion rendered in the above cause on the 27th day of May, 1968, for the following reasons:

## I.

Petitioner was convicted under the Louisiana "theft" statute, LSA-R.S. 14:67, by a five man jury

on the 27th of June, 1966, and the conviction was affirmed by the State Supreme Court in December of 1967. Thus, both the trial and the disposition of the appeal occurred well prior to the decision of the Supreme Court of the United States in *Duncan v. State of Louisiana* (No. 410, Oct. Term, 1967, reported in *The Criminal Law Reporter* of May 22, 1968, Sec. 3, 3059).

## II.

In the instant case, the constitutional rights of petitioner were prejudiced by the fact that he was tried for a felony, by a five-man jury, as distinguished from the twelve-man jury provided for in other felonies under Louisiana law. This presents the same constitutional problem as to denial of due process and equal protection of the laws as was involved in the *Duncan* case, *supra*. Although this point was not raised before, either during the trial in the District Court or in the State Supreme Court, it is submitted in view of the fact that defense counsel relied upon the jurisprudence as it existed prior to *Duncan, supra*, the delay in raising a serious constitutional issue of this magnitude is excusable and the issue should now be considered by this Honorable Court on rehearing in this case.

## III.

Petitioner further shows, as an additional reason for the granting of the rehearing herein, that there has

been another major change in the law quo ad proper jury selection. We refer to the decision of the Fifth Circuit Court of Appeals in *Labat, et al. v. Bennett, Warden,* 365 F. 2d 698; (Fifth Circuit, Aug. 15, 1966, Rehearing denied, Sept. 30, 1966); Cert. den. 87 S. Ct. 1303, 386 U. S. 991, 18 L. Ed 2d 334.

Although petitioner herein is a white man, it is submitted that he was deprived of due process by the manner of juror selection which was declared invalid in *Labat, supra.* Moreover, in the opinion by the Fifth Circuit in the *Labat* case, the Court specifically relies upon *Thiel vs. Southern Pacific Co.* (1946) 328 U. S. 217, 66 S. Ct. 984, 90 L. Ed. 1183. In that case the Supreme Court of Georgia, dealing with a civil jury trial had held that exclusion of wage earners from the jury venire defeated the obtaining of a true and realistic cross-section of wage earners and this destroyed the proper "cross-section of the community" approach. This system of selection was held invalid and unconstitutional even as to a white litigant in a civil case. This issue, too, as in the first ground urged above, is excusable because counsel for defendant relied upon the existing jurisprudence at the time of trial and at time of the hearing in the Supreme Court of Louisiana; hence, the delay in raising this issue should not prevent its consideration at this time by Your Honors. The selection of jurors at the time of both the trial and the indictment in the instant case was virtually the same as it was at the critical time of *Labat, supra;* hence, due process was denied petitioner here likewise.

Since the instant case was tried on June 27, 1966, counsel for defendant (petitioner herein) had no means of anticipating the sweeping effect of the Fifth Circuit holding in *Labat, supra,* which was not to be decided until August 15, 1966, nearly two months later. Therefore, when the *Labat* decision was rendered it was apparently too late to raise the issue as to improper grand or petit jury selection in this proceeding. Hence, unless a rehearing is granted herein from the denial of certiorari, petitioner will be deprived of serious constitutional rights because he was both indicted and tried by jurors selected in the same manner as were those in *Labat, supra.* Moreover, although petitioner is a white man, under the rationale of the *Thiel* case, *supra,* the lack of an "adequate cross section of the community," quo ad jury selection, deprives petitioner of both due process of law and the equal protection of the laws.

For the foregoing reasons, petitioner respectfully submits that a rehearing should be granted herein from the denial of certiorari and that, ultimately the judgment below should be set aside and a new trial ordered.

Respectfully submitted,

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**CERTIFICATE OF COUNSEL.**

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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G. W. GILL, SR.,
Of Counsel for Petitioner.

## CERTIFICATE OF SERVICE.

I, G. Wray Gill, Sr. do hereby certify that I am of counsel for petitioner in the foregoing application for rehearing and that I am a member in good standing of the Bar of the Supreme Court of the United States. I further certify that copies of the foregoing petition for rehearing have been served upon the Attorney-General of Louisiana and the District Attorney for the Parish of Orleans, State of Louisiana, at their respective offices, by mail, by posting same, postage prepaid, on the ... day of June, 1968.

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G. W. GILL, SR.